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Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

CR-05-1849 JH

vs.

DAVID REID,

Defendant.

STATUS MEMORANDUM

Excludable delay under 18 U.S.C. §3161(h)(i)(F) will may occur as a result of this motion or of an order based thereon.

The defendant David Reid, by counsel undersigned, hereby files this memorandum with regard to the pending trial date and other issues to be discussed at the Status Conference presently set for August 6, 2008.

Mr. Reid waives his presence at this hearing. Billy Blackburn,

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1 counsel of record for a co-defendant herein, will appear for counsel
2 undersigned for this hearing. Counsel undersigned has been committed to
3 be in Denver, Colorado for a proceeding in a murder case on the date of
4 this hearing. Bill Kirchner, a lawyer who is a member of this law firm, was
5 scheduled to be present for this hearing, but has been hospitalized. The
6 other lawyer in the firm, Jennifer Mauet, is presently on maternity leave
7 having just given birth to her first child.
8
9

10 The Court has set this matter tentatively for trial on January 26, 2009.
11 That setting will place this trial in conflict with a previously set date in
12 another matter.
13

14 Counsel undersigned is trial counsel for Carlos Molinares-Nunez in
15 *United States of America v. Molinares-Nunez*, CR-06-1955-TUC-JMR(JM).
16 This matter is pending in the United States District Court, Tucson, Arizona,
17 and is set for trial on January 6, 2009. It is a far-flung, multi-defendant drug
18 conspiracy involving many tons of marijuana smuggled into the United
19 States over a multi-year period of time. Mr. Molinares-Nunez is the lead
20 defendant and is charged in a battery of counts including a Continuing
21 Criminal Enterprise. The case will involve evidence of more than fifty (50)
22 seizures and a comprehensive series of fixed and roving wiretaps. It is
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1 anticipated that the trial will last more than a month in its present
2 configuration. Mr. Molinares-Nunez is in custody and the trial date has
3 been for some time by Chief Judge John Roll.
4

5 It is the understanding of the counsel undersigned that the estimated
6 length of trial herein is but two weeks. The decision as to how long the
7 government will take to put their case on lies solely within the knowledge of
8 the Government. However, given the fact that we are dealing with a
9 number of acts and over one hundred fifty thousand pages of disclosure,
10 counsel undersigned reasonably believes that it is unrealistic to assume
11 that the Government will finish within a two week period.
12

13
14 There are also a significant number of issues that remain to be
15 resolved as well as lengthy trial and motion preparation steps that defense
16 counsel need to undertake before they are prepared to go to trial.
17

18 There is no doubt this matter has been pending for a long period of
19 time, but everything has basically been "on hold" due to the lengthy legal
20 proceedings involving the defendant Jarvis' status of counsel issues. The
21 Government requested, the defendants did not object, and the Court
22 ordered that everything stop until that issue was resolved. Thus, a number
23 of discovery issues and questions, as well as motions related thereto, have
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1 not been filed with the agreement and understanding of all the parties and
2 the approval of the Court. Discovery and new investigative activities by the
3 Government have been ongoing. Those steps now need to commence.
4

5 Defense counsel have been discussing a number of issues with the
6 Government including what witnesses they will actually call, what calls of
7 each defendant they will actually use, what co-conspirator hearsay they
8 may attempt to utilize, what exhibits they may introduce at trial (and the
9 source thereof), and what acts (relevant and Rule 404), and what experts
10 are going to be the subject of the trial evidence. Once the Government
11 (which has been working on this case for a significantly longer period of
12 time than the defendants and their counsel) discloses this, the defendants
13 and their lawyers will be able to better focus on various motions and take
14 other preparations steps.
15
16

17 Counsel undersigned has suggested to the Government that all of
18 these matters be disclosed well in advance of trial to facilitate the saving of
19 time by all parties and the Court. For example, if there are thousands of
20 exhibits, makes no sense for the defendants to prepare for various
21 admissibility questions and Motions to Suppress on those exhibits when
22 the Government intends to introduce but a hundred. It would make more
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1 sense from an allocation of time standpoint that the Government specify
2 what they will use so that efforts can be focused on those specific exhibits
3 and issues rather than wasting it on another matters. Handling these steps
4 but five days before trial will not facilitate the goal of saving time and
5 reducing the number of issues and motions that the defense will need to
6 bring in advance thereof.
7

8
9 Counsel undersigned has also suggested to the Government that if
10 these matters are disclosed, for example, ninety days before trial, defense
11 counsel could be deemed to stipulate to the admissibility of the items
12 unless a specific objection is filed, thirty days before trial. An example of
13 this would be the specific calls the Government alleges that a defendant is
14 on. If the specific list is disclosed (rather than a laundry list of thousands of
15 calls that *may* be used), counsel for the defendant can determine if there is
16 an identification issue or not. If so, a specific objection can be filed. If not,
17 the caller identification can be deemed to be admitted and all parties and
18 the Court save a great deal of time in trial by eliminating ancillary issues
19 that could be handled well in advance thereof *if* counsel can focus on the
20 matters that will actually be the subject of the trial.
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24 Another example would be exhibits. If defense counsel know what
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1 will be used at trial and the source thereof, counsel can focus on
2 foundation deficiencies, possible motions to suppress (search or, for
3 example, improper use of a Grand Jury to obtain evidence post-
4 indictment), possible motions *in limine*. Leaving those matters to the
5 eleventh hour makes for more work for all counsel, more wasted Court
6 time, potential delay in trial or a last minute continuance, and more issues
7 on appeal.
8
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10 Mr. Blackburn will also address the issue of the completeness of the
11 *Brady* disclosure with regard to cooperating witnesses. There may be
12 additional investigation and Court steps necessary after the Government
13 completes its disclosure on these individuals including orders to obtain
14 Presentence Investigation Reports, Pretrial Services Report and
15 Supervision Records, Probation Records, and other Court materials for
16 which an order is required. Frequently, once these matters are disclosed,
17 additional public records requests for underlying reports need to be made.
18 Completing the *Brady* packages for the cooperators on the eve of trial will
19 not allow sufficient time to make the proper use of that *Brady* material, thus
20 creating the need for either a continuance or other relief from the Court.
21 Disclosing these matters well advance of trial will allow defense counsel to
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1 go forward and complete their due diligence and to proceed with the trial
2 when it is scheduled.

3
4 This procedure has been utilized in the past in other matters counsel
5 undersigned has been involved in with a resultant substantial savings in
6 time. Thus far, the Government does not appear willing to agree with
7 counsel undersigned is suggested procedure. The Government has had its
8 collective arms around this case for years. The number of defendants is
9 much reduced and it appears as though all who are left will proceed to trial.
10 Thus, it appears the Government should now be in a position to determine
11 and disclose now what it will use to prove its case. To do so well in
12 advance of trial will save time and serve the interests of justice well.
13
14

15 The Motion To Suppress the wiretap is going to require a number of
16 steps to be performed in serial fashion. This Court has read a general
17 discussion of some of the steps needed in a wiretap litigation in conjunction
18 with prior pleadings in this case, including but not limited to a Motion to
19 Continue. The most significant attack on any wiretap application is in the
20 area of necessity. A necessity analysis focuses on aspects of the
21 Government's investigation that are often undisclosed and usually involves
22 a *Franks* hearing request. To be able to obtain a *Franks* hearing sufficient
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1 facts need to be presented to the Court showing that facts in the affidavit
2 were either false or that there were material omissions from the wiretap
3 initiation affidavit or renewal applications. The focus of that defense
4 investigation almost always begins with the target telephone
5 owner/operator. In this case that is the defendant Dana Jarvis.
6

7 In past wiretap cases, counsel undersigned has been able to review
8 the affidavit(s) with the target telephone holder (as counsel for that person
9 or with the approval of the individual's counsel of record) to test the
10 Government's averments for both correctness and completeness.
11 However, and quite understandably, in this case counsel for the defendant
12 Jarvis has been unwilling to do that until the recent legal proceedings were
13 resolved due to significant issues that existed with regard to his choice of
14 counsel. None of those steps have been able to take place until very
15 recently and only now are they getting under way with his new counsel. A
16 lengthy development of those issues is usually followed by a defense
17 investigation designed to corroborate or supplement points raised during
18 that initial effort. Then, specific motions can be directed to the Government
19 if the disclosure is incomplete on those issues.
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24 The area of confidential sources is also one that needs to be fully
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1 developed. Frequently, claims are made that the recitation in the affidavit
2 of the ability to penetrate an organization by particular confidential sources
3 is given short shrift and not accurately set out. Specifically, facts may
4 develop that the confidential sources had far more access to higher ups
5 and the ability to obtain information than the affidavit states which cuts
6 against necessity. These kinds of claims frequently become the grounds
7 for a Court granting a *Franks* hearing request and when fully developed at
8 that hearing, the underpinnings for an order of suppression. However,
9 those issues require consultation with the target telephone holder followed
10 by extensive investigation and the potential of pretrial motions designed to
11 uncover additional information known **only** by the Government and its
12 agents and generally (and often understandably) not the subject of “open
13 file” disclosure.
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17 These steps are time consuming, must be undertaken one after the
18 other, and only now are commencing because of the other unrelated legal
19 issues that are certainly not the result of any act or omission on the part of
20 any co-defendant or their counsel. Simply put, Mr. Jarvis was properly
21 pursuing his legal remedies and we have been unable to go forward
22 because of those efforts.
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1 The results of a related issue as to whether or not the pen register
2 legally captured content in this case is presently being developed by the
3 defendants and their counsel. That too is an extremely time consuming
4 issue in addition to the other matters discussed herein.
5

6 It is not reasonably expected that a Motion To Suppress and Request
7 For *Franks* Hearing could be ready for filing, given the delays occasioned
8 by legal steps separate apart from the bulk of the defendants herein, until
9 the early part of December, 2008. Counsel undersigned would also
10 respectfully suggest a trial date in June, rather than January, to allow all of
11 these steps and others to be completed.
12

13 Counsel undesignated is also aware that a new defendant has come in
14 to the case relatively recently. Mr. Jarvis also has different counsel. Those
15 defendants and their counsel can better speak to their issues of the viability
16 of a January trial date at the hearing.
17

18
19 RESPECTFULLY SUBMITTED this 4th day of August, 2008

20 LAW OFFICES OF
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22

23 BY /S/ Walter Nash
24 WALTER NASH
25 Attorney for Defendant Reid
26

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of August, 2008, I served a true and correct copy of this Memorandum by U.S. Mail, postage prepaid, on counsel for the United States at the address listed below:

James R.W. Braun, Esq.
Assistant United States Attorney
P.O. Box 607
Albuquerque, New Mexico 87103

It has also been sent to counsel for the United States and all current defense counsel electronically.

/s/ Walter Nash

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